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COPY

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10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
11  
12 IN AND FOR THE COUNTY OF MARICOPA

13 THE STATE OF ARIZONA ex rel. TERRY  
14 GODDARD, the Attorney General, and THE  
15 CIVIL RIGHTS DIVISION OF THE ARIZONA  
DEPARTMENT OF LAW,

16 Plaintiff,

17  
18 vs.

19 CITY OF COTTONWOOD; and CITY OF  
20 COTTONWOOD POLICE DEPARTMENT,

21 Defendants.

No. CV2010-019811

COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF

(Nonclassified Civil)

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23 Plaintiff, the State of Arizona ex rel. Terry Goddard, the Attorney General, and the  
24 Civil Rights Division of the Arizona Department of Law (collectively the "State"), for its  
25 Complaint alleges as follows:  
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## INTRODUCTION

The State brings this action under the Arizona Civil Rights Act to correct unlawful employment practices, to provide appropriate relief to an aggrieved person, and to vindicate the public interest. Specifically, the State seeks to redress the injury sustained when Defendants retaliated against Charging Party Monica Kuhl, a Cottonwood police detective, because she filed a charge of sex-based employment discrimination alleging that Defendants had wrongfully denied her promotion to sergeant, purportedly because she was not able to pass a physical fitness test that Defendants knew had a disparate impact on women, and because she participated in the Arizona Civil Rights Division's investigation of that charge. Kuhl's discrimination charge is the basis of the State's lawsuit against Defendants currently pending in the Superior Court of Arizona, Maricopa County (CVR2009-014365) ("First Lawsuit"). As alleged in this second lawsuit, Defendants' unlawful acts include (1) denying Kuhl an important training opportunity; (2) requiring her to submit to an unwarranted medical examination; and (3) placing her on light duty for five months when similarly situated male officers were not placed on light duty at all, purportedly because she was medically "unfit" for duty, although Kuhl's own physician represented there were "no contraindications" to her performing all her duties as a Cottonwood police detective. Defendants' actions in this case constitute discrimination in retaliation for protected oppositional and participatory conduct in violation of the Arizona Civil Rights Act, A.R.S. § 41-1464(A).

## JURISDICTION AND VENUE

- 22 1. This Court has jurisdiction of this matter pursuant to A.R.S. § 41-1481(D).
- 23 2. Venue is proper in Maricopa County pursuant to A.R.S. § 12-401(17).

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5. Defendant City of Cottonwood (“Cottonwood”) is an incorporated municipality located in Yavapai County, Arizona. Cottonwood’s City Hall is located at 827 N. Main Street, Cottonwood, Arizona 86326.

7. Kuhl is currently a detective with CPD, where she has worked as a law enforcement officer since approximately November 23, 1997.

8. Jody Fanning currently is CPD's Chief of Police.

9. Gary Eisenga currently is a CPD commander. Previously, he was a CPD patrol sergeant and had primary responsibility for implementing the physical fitness test at issue in Kuhl's sex-based employment discrimination charge and the State's First Lawsuit.

10. At all relevant times, Cottonwood and CPD (when collectively, “Defendants”) were employers within the meaning of A.R.S. § 41-1461(4)(a).

11. At all relevant times, Kuhl has been an employee of CPD within the meaning of A.R.S. § 41-1461(3)(a).

12. The State is informed and believes and therefore alleges that Defendants were legally responsible for the acts or omissions giving rise to this cause of action and legally and proximately responsible for damages as alleged pursuant to A.R.S. § 41-1481(G).

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## **BACKGROUND**

13. On May 6, 2008, Kuhlert filed a charge of sex-based employment discrimination with the Division alleging that Defendants had wrongfully denied Kuhlert promotion to sergeant because she was unable to pass a physical fitness test that Defendants knew had a disparate impact on female police officer.

14. On or about May 12, 2008, Kuhlert took the physical fitness test in an attempt to qualify for promotion and injured her back during the 1.5 mile run component of the test. Shortly thereafter, Kuhlert filed a worker's compensation claim to pay for spinal decompression therapy.

15. Kuhlert did not miss any work as a result of the injury sustained during the May 2008 physical fitness testing, nor did the injury limit her ability to perform her duties as a CPD detective.

16. On or about April 28, 2009, at the conclusion of the Division's investigation of Kuhlert's May 6, 2008, charge, the Division issued a Reasonable Cause Determination ("RCD") alleging that Defendants had discriminated against Kuhlert based on sex by implementing an invalid physical fitness test in a discriminatory manner to deny Kuhlert a promotion for which she was qualified and to award the sergeant position to less-qualified male officers.

17. On or about May 5, 2009, the Division filed the First Lawsuit, alleging claims for sex-based disparate impact and disparate treatment employment discrimination under A.R.S. § 41-1463.

18. On or about April 20, 2009, before the RCD was issued, Kuhlert appeared for another round of physical fitness testing under the policy Kuhlert was opposing through her May 6, 2008, charge. Because she had just finished spinal decompression therapy for the back injury she sustained during the May 2008 physical fitness testing, Kuhlert provided a medical release requesting that she be allowed an alternative test of aerobic fitness to the 1.5 mile run, such as walking 2.0 miles. The release form indicated that there were "no contraindications" to her

1 being capable of performing the essential functions of her job. Kuhlert was told she could take  
2 the physical fitness test the next time it was offered.

3 19. According to GO 206, the CPD General Order implementing the physical fitness  
4 test, the purpose of the 1.5 mile run is to measure "aerobic power or cardiovascular endurance  
5 (the ability to sustain exertion over time)" and the test "consists of running/walking as fast as  
6 safely possible the distance of 1.5 miles."

7 20. On April 30, 2009, after the RCD was issued, Kuhlert received an e-mail from  
8 Eisenga notifying her and others that a make-up physical fitness exam for those who were not  
9 able to take the exam in April 2009 was scheduled for May 18, 2009, at 8:00 a.m and 5:00  
10 p.m. The email indicated that all recipients would be required to appear and take the physical  
11 fitness exam. Kuhlert responded that she still would not be able to do the 1.5 mile run and asked  
12 if Eisenga would require another note from her physician.

13 21. On May 1, 2009, Kuhlert was informed by CPD human resources ("HR") that the  
14 City was in the process of obtaining clarification from Kuhlert's physician about his comments  
15 regarding Kuhlert's inability to complete the 1.5 mile run. HR told Kuhlert that CPD would  
16 determine whether it needed another note from Kuhlert's physician after they spoke to him.

17 22. On May 4, 2009, Kuhlert's physician followed up with a Cottonwood worker's  
18 compensation claims adjuster in response to the adjuster's letter inquiring about Kuhlert's work  
19 restrictions. Kuhlert's physician clarified in writing that he had never recommended work  
20 restrictions for Kuhlert. Rather, he indicated that Kuhlert had significant pain after a long run and  
21 recommended that she be given an alternative aerobic physical fitness test to the 1.5 mile run.  
22 Specifically, he recommend that Kuhlert "should be given the opportunity to walk or ride a  
23 stationary bike, as they do in the military."

24 23. Despite Kuhlert's physician's clarification, on May 8, 2009, Detective Kuhlert received  
25 written notice from HR that CPD would require her to be examined by an Arizona Peace  
26 Officer Standards and Training ("AZPOST")-trained doctor before she could be eligible to

1 take the physical fitness exam. The available examination dates with the AZPOST-trained  
2 doctor were May 14, 2009, and anytime on May 18, 2009, the same date as the physical fitness  
3 exam.

4 24. Kuhlt informed HR that she was scheduled to be in Phoenix for a financial crimes  
5 training on May 13 and 14, 2009. She also indicated that she was scheduled for firearms  
6 training at 6:00 p.m. on May 18, 2009, and therefore could only appear for the physical fitness  
7 exam at 8:00 a.m. on that day. Accordingly, Kuhlt could not meet with the AZPOST-trained  
8 doctor and take the physical fitness on May 18, 2009.

9 25. On May 11, 2009, Kuhlt was informed by Eisenga and her direct supervisor that  
10 she could not attend the financial crimes training so that she would be available for  
11 examination by the CPD-chosen doctor ("CPD's doctor") on May 13. Eisenga did not explain  
12 to Kuhlt the reason why the examination had to take place on May 13 when the doctor initially  
13 was only available on May 14 or May 18.

14 26. On May 13, 2009, as required, Kuhlt was examined by CPD's doctor, who  
15 informed Kuhlt that, because she could not run without her back becoming sore, she was  
16 "disqualified to be a peace officer at this time." CPD's doctor directed Kuhlt to obtain  
17 physical therapy and told her that she needed to "have her back cleared" to be a police officer.  
18 He further stated in his report that he felt "with rehab she would be able to complete the test  
19 without pain." CPD's doctor did not recommend any alternative aerobic fitness test that could  
20 replace the 1.5 mile run.

21 27. Fanning placed Kuhlt on light duty immediately after her examination by CPD's  
22 doctor, pending receipt of his written report. Kuhlt also was not allowed to take any  
23 component of the physical fitness exam, even though her doctor had cleared her to take every  
24 component of the exam except the 1.5 mile run, for which he recommended an alternative test.

25 28. CPD did not require Kuhlt to be examined by an AZPOST-trained doctor after she  
26 was injured during physical fitness testing in May 2008 or at any time during her treatment for

1 that injury, and it did not place her on light duty during the period of time that she was  
2 receiving worker's compensation benefits to pay for those treatments.

3 29. Defendants did not question Kuhl's medical release or her ability to perform her  
4 job duties until after the Division issued the RCD on Kuhl's May 6, 2008, discrimination  
5 charge.

6 30. CPD never followed up with Kuhl about the physical therapy that CPD's doctor  
7 recommended, and a different AZPOST-trained doctor found her fit for duty just five months  
8 later with no additional treatment or any change in Kuhl's back condition.

9 31. During the roughly five-month period that Kuhl was on light duty, she engaged in  
10 work activities that were consistent with full duty status with the full knowledge and approval  
11 of her supervisors.

12 32. Whereas Kuhl was put on light duty after requesting permission to walk 2.0 miles  
13 rather than walk/run 1.5 miles when taking the mandatory physical fitness test, Defendants  
14 allowed one male sergeant to be completely excused from taking the physical fitness test for  
15 medical reasons without being placed on light duty and allowed a second male officer to be  
16 excused from the agility run, the 300 meter run and the 1.5 meter run due to his back condition  
17 without assigning that officer to light duty, either.

18 33. As a result of being placed on light duty, Kuhl was prevented from participating in  
19 off-duty police activities for which she could have received additional pay.

20 34. On June 9, 2009, Kuhl filed a charge alleging that Defendants retaliated against  
21 her after the Division issued the RCD on her May 6, 2008, discrimination charge.

22 35. On April 8, 2010, the Division issued a Second RCD, which alleged that there was  
23 reasonable cause to believe that, because Kuhl opposed Defendants' discriminatory  
24 application of an invalid physical fitness test, Defendants retaliated against her by, among  
25 other things, denying her an important training opportunity; requiring her to submit to an  
26

1 unwarranted medical examination; and placing her on light duty for five months when  
2 similarly situated male officers were not placed on light duty at all.

3 36. On June 2, 2010, Kuhlt, the Division and Defendants attempted to conciliate  
4 Kuhlt's retaliation charge, as well as her disparate impact and disparate treatment claims in the  
5 First Lawsuit, in a mediation session with a private mediator. That attempt did not result in a  
6 settlement agreement.

7 37. Under a May 6, 2010 tolling agreement, the State and Defendants stipulated to  
8 extend the time period during which the State could file a civil action against Defendants  
9 and/or move to amend the First Lawsuit based on Kuhlt's retaliation charge until June 18,  
10 2010.

### 11 STATEMENT OF CLAIMS

12 38. The State re-alleges and incorporates by reference the allegations contained in  
13 paragraphs 1 through 37 of this Complaint.

14 39. Under A.R.S. § 41-1464(A), it is an unlawful employment practice for an  
15 employer to discriminate against any of its employees because the employee opposed any  
16 practice which is an unlawful employment practice or because the employee made a charge,  
17 testified, assisted or participated in any manner in a Division investigation.

18 40. Kuhlt opposed Defendants' allegedly discriminatory employment practices by  
19 filing her May 6, 2008, charge with the Division. Kuhlt participated and gave testimony  
20 during the Division's investigation of that charge, which resulted in the RCD against  
21 Defendants on April 28, 2009.

22 41. Because Kuhlt opposed Defendants' discriminatory conduct and participated in the  
23 Division's investigation of that conduct, Defendants retaliated against Kuhlt in violation of  
24 A.R.S. § 41-1464(A) by, among other things, denying her an important training opportunity;  
25 requiring her to submit to an unwarranted medical examination; and placing her on light duty  
26 for five months when similarly situated male officers were not placed on light duty at all,



1 purportedly because she was medically "unfit" for duty, although Kuhl's own physician  
2 represented there were "no contraindications" to her performing all her CPD duties.

3 42. As a result of Defendants' discrimination, Kuhl suffered monetary damages for  
4 which she should be compensated in an amount to be determined at trial pursuant to A.R.S. §  
5 41-1481(G).

6 43. To remedy the effects of Defendants' discrimination, Kuhl also is entitled to  
7 affirmative and injunctive relief under A.R.S. § 41-1481(G).

8 44. The State also is entitled to injunctive relief against Defendants' actions pursuant to  
9 A.R.S. § 41-1481(G).

10 **PRAYER FOR RELIEF**

11 WHEREFORE, the State requests that this Court:

12 A. Enter judgment on behalf of the State, finding that Defendants unlawfully  
13 retaliated against Kuhl in violation of the Arizona Civil Rights Act.

14 B. Enjoin Defendants, their successors, assigns and all persons in active concert or  
15 participation with Defendants, from engaging in any employment practice, including  
16 retaliation, which discriminates in violation of the Arizona Civil Rights Act.

17 C. Order Defendants, their successors, assigns and all persons in active concert or  
18 participation with Defendants, to create and enforce policies, practices and programs that  
19 provide equal employment opportunities for all their employees, and that eradicate the effects  
20 of their present unlawful employment practices, including but not limited to policy changes  
21 and training.

22 D. Order Defendants, their successors, assigns and all persons in active concert or  
23 participation with Defendants, to adopt and enforce an equal opportunity in employment  
24 policy that prohibits retaliation and that includes a procedure for reporting and investigating  
25 allegations of retaliation as well as for sanctioning substantiated allegations of retaliation.

1 E. Issue an Order authorizing the State to monitor Defendants' compliance with the  
2 Arizona Civil Rights Act and order Defendants, successors, assigns and all persons in active  
3 concert or participation with Defendants, to pay the State a reasonable amount for such  
4 monitoring.


5 F. Award the State its taxable costs incurred in bringing this action.

6 G. Award monetary damages to Kuhl in an amount to be proven at trial.

7 H. Grant such other and further relief as this Court may deem just and proper in the  
8 public interest.

9 Dated this 17th day of June, 2010.

10 TERRY GODDARD  
11 Attorney General

12  
13 By 

14 Ann Hobart  
15 Assistant Attorney General  
16 Civil Rights Division  
Attorneys for Plaintiff

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